Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1462

ROBERT McGUIRE, individually and as Police Commissioner of the City of New York,

Petitioner,

-against-

CHARLES W. LEIGH and LEONARD ALLEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
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No.

ROBERT McGUIRE, individually and as Police Commissioner of the City of New York,

Petitioner,

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CHARLES W. LEIGH and LEONARD ALLEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The above named petitioner respectfully prays that a writ of certiorari issue in this case, directed to the United States Court of Appeals for the Second Circuit, to review its judgment dated December 19, 1979.

Opinions Below

The opinion of the Court of Appeals (1a-10a)* has not been officially reported

*Numbers in parentheses followed by "a" refer to the pages of the appendices annexed hereto.

as of this writing. The opinion of the District Court (11a-24a) is reported at 468 F. Supp. 1163.

Jurisdiction

The judgment of the Court of Appeals was entered December 19, 1979. A timely motion for rehearing en banc was denied on January 29, 1980 (25a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does a federal court have jurisdiction to entertain, as a civil rights action, a suit which would be otherwise barred in a state court under res judicata because of its having come to final judgment in the state's highest court?

2. Does 28 U.S.C. §1738 require that federal courts apply the local law of res judicata in civil rights cases where the state and federal issues were litigated to a conclusion in the state courts?

3. Does the concept of federalism prohibit a federal court from tolling a borrowed state statute of limitations in civil rights cases where the state's law on the subject does not so provide and where no overriding federal policy considerations are implicated?

4. Is 42 U.S.C. §1983 properly invoked where the alleged deprivation does not involve rights secured by the Constitution or by statutes providing for equal rights or for the protection of civil rights?

Statement of the Case

Respondents Charles W. Leigh and Leonard Allen (hereinafter "respondents") were appointed to the New York City Police Department on July 16, 1951 (JA 15, 46).* On July 2, 1968, they were indicted by a grand jury and charged with conspiring to take unlawful fees in violation of New York Penal Law §§580 and 1826 (JA 16).

*References are to pages of the Joint Appendix submitted to the court below.

Following the indictments, departmental charges and specifications were served upon respondents on July 30, 1969, alleging participation in a gambling operation and failure to enforce the anti-gambling laws (JA 16, 46).

During the departmental trial, respondents raised the defense that the wiretap evidence used against them had been illegally obtained in violation of the Fourth and Fourteenth Amendments of the Constitution and Section 605 of the Federal Communications Act (JA 16-17, 47). Respondents were found guilty on all the charges and specifications and were dismissed from the force by the then Acting Police Commissioner on October 7, 1970 (JA 17, 47).

Thereafter, they instituted a special proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR), seeking to annul the order of dismissal, on the grounds, inter alia, that the Acting Commissioner's deter-

mination was arbitrary and capricious and based on evidence admitted in violation of the Constitution and federal statutory law (JA 47). The proceeding was transferred to the Appellate Division, First Judicial Department, where respondents raised and litigated their federal constitutional and statutory claims (JA 47-48).

On June 29, 1971, the Appellate Division annulled the Police Commissioner's order of dismissal on the ground that Section 605 of the Federal Communications Act precluded the admission of illegally procured evidence in administrative as well as criminal proceedings (JA 48). On the same day, the court also affirmed the decision in the criminal case against respondents, which decision ordered the wiretap evidence suppressed (JA 17-18). Shortly thereafter, however, the New York Court of Appeals decided People v. Feinlowitz, 29 NY 2d 176 (1971), which held that the Omnibus Crime Control and Safe Streets Act of 1968 allowed the admission of wiretap evidence

obtained prior to its effective date so long as the Act was substantially complied with (JA 18). Consequently, petitioners moved for reargument, and on September 30, 1971, upon granting the motion, the Appellate Division vacated its prior order of June 29, 1971 annulling the dismissals and confirmed the Police Commissioner's determination to dismiss the respondents. (JA 18, 48-49). In addition, in the criminal case, the court reversed its prior order granting suppression and remitted the matter to the trial judge to ascertain whether the evidence was admissable under section 605, as construed in Feinlowitz (JA 19).

Respondents then filed a notice of appeal to the New York Court of Appeals on October 19, 1971. That appeal was dismissed by the court on February 15, 1974 for failure to perfect, in that it was not timely argued or submitted pursuant to the rules of the court (JA 49).

In the interim, on November 29, 1972, respondents had been found guilty in cri-

minal court, on remand, of violating Penal Law §§580 and 1826 (JA 19). They each received six month jail terms and paid fines of $250. Enforcement of the jail terms was stayed pending the outcome of the appeal (JA 5). Respondents' appeal to the Appellate Division on their criminal convictions resulted in a finding dated February 25, 1974, that section 605 had not been substantially complied with and that the evidence was obtained in contravention of the Constitution. People v. Koutnik, 44 AD 2d 48. Accordingly, the Appellate Division vacated their convictions (JA 19).

On April 17, 1974, respondents moved in the Appellate Division for an order pursuant to CPLR 5015(a)(5) seeking to vacate that court's order of September 30, 1971 which confirmed their dismissals. The motion was grounded on the court's decision in People v. Koutnik, supra, and was granted on June 18, 1974. The court thus vacated its September 30, 1971 order and reinstated its June 29, 1971 order which annulled the

Police Commissioner's determination to dismiss respondents (JA 20, 50-51). The Commissioner, however, applied for a stay of the Appellate Division's June 18th order pending disposition of the Koutnik appeal in the New York Court of Appeals, and on December 5, 1974, the application was granted (JA 21, 51).

On October 23, 1975, the Court of Appeals affirmed the Koutnik decision (JA 21). Thereafter, the respondents moved in the Appellate Division to have that court vacate its previous stay which had been granted pending the Koutnik appeal. Petitioner cross-moved to vacate the court's June 18, 1974 order which reinstated its earlier order annulling the dismissals (JA 22, 51). The first ground for the petitioner's cross-motion was that the Appellate Division was without power to review the final order of the Court of Appeals of February 15, 1974 dismissing respondents' appeal for failure to perfect (JA 51-52). The second

ground concerned the exclusionary rule, to wit, that it was not mandated by the Constitution, but rather designed as a prophylactic to prevent the violation in the future of constitutional rights, whose purpose would not be furthered by rescinding the Police Commissioner's order terminating respondents' employment with the Department (JA 52).

On December 16, 1975, the Appellate Division, without opinion, granted petitioner's cross-motion, thereby vacating its June 18, 1974 order which had reinstated its earlier order annulling the dismissals, and denied respondents' motion as academic (JA 22, 52).

Respondents thereafter filed a second appeal to the Court of Appeals, on constitutional grounds, pursuant to CPLR 5601(b)(1) (JA 52). The respondents' jurisdictional submission in the Court of Appeals raised the federal constitutional claims in connection with the wiretap evidence introduced at the departmental trial (JA 53).

By order entered May 3, 1977, the Court of Appeals dismissed the appeal for want of a substantial constitutional question having been directly presented. Leigh v. Murphy, 42 NY 2d 823. Respondents subsequent motion for leave to appeal was denied on October 6, 1977. 42 NY 2d 809. Seven months later, on May 12, 1978, respondents commenced this civil rights action in the District Court for the Southern District of New York (SWEET, D.J.), raising the same constitutional and statutory claims as had been earlier presented.

REASONS FOR GRANTING THE WRIT

1. THE FAILURE OF THE COURT OF APPEALS TO BAR RESPONDENTS' CIVIL RIGHTS ACTION UNDER PRINCIPLES OF RES JUDICATA IS IN PLAIN DEROGATION OF 28 U.S.C. §1738 AND IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURTS.

(1)

Title 28 U.S.C. §1738 provides in pertinent part that "[t]he records and judicial proceedings of any court of any... State, Territory or Possession... shall

have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law in the courts of such State, Territory or Possession from which they are taken." This legislation, which finds its origin in the Judiciary Act of 1790, has been held to be applicable to federal courts (see, e.g., Davis v. Davis, 305 U.S. 32, 40 [1938]) and requires them to accord to state court judgments the same finality and conclusiveness they would receive in the jurisdiction of their rendition through that state's law of res judicata. See, e.g., Riley v. New York Trust Co., 315 U.S. 343, 349 (1942); American Surety Co. v. Baldwin, 287 U.S. 156, 165-167 (1932). As one commentator has stated, the act is not "a matter of judicial grace", but "is the command of Congress...." Currie, Res Judicata: The Neglected Defense, U. Chi. L. Rev. 317, 326 (1978).

In rejecting the petitioner's res judicata defense, the Court of Appeals completely ignored §1738's mandate, despite the fact that final judgments had been rendered by the New York Court of Appeals which were binding and conclusive on the parties concerned and entitled to res judicata effect in New York.* The first of these became conclusive on February 15, 1974, when the New York Court of Appeals dismissed respondents' appeal as of right for failure to prosecute. The appeal was from a final (as opposed to an interlocutory) judgment of the Appellate Division before which the parties had fully and fairly litigated the constitutionality of the wiretap evidence. Thus, respondents' failure timely

*The test of res judicata in New York is whether a "different judgment in [a subsequent action] would destroy or impair rights or interests established by the [earlier action]." Schuylkill Fuel Corp. v. B. & C. Neiberg Realty Corp., 250 N.Y. 304, 307, 308 (1929) (Cardozo, C. J.). Cf., Herendeen v. Champion Internat'l Corp., 525 F. 2d 130, 133 (2d Cir., 1975).

to perfect their appeal rendered the situation as if no appeal had been taken. Just as "'[t]he effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered'" (Schuylkill, supra at 306, quoting Wilson's Executor v. Deen, 121 U.S. 525, 534 [1887]), so too should it be not dependent upon whether the judgment became final because of a failure to prosecute the appeal.*

Respondents did not attempt to seek review before this Court as was then incumbent upon them to do. See, e.g., Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975); Ellentuck v. Klein, 570 F. 2d 414 (2d Cir., 1978); Roy v. Jones, 484 F. 2d 96, 98, 99 (3d Cir., 1973).

The preclusive effect of the Appellate Division's judgment on the

*That the appeal was dismissed for failure to prosecute was conspicuously absent from the Court of Appeals' rendition of the facts.

merits was later recognized and reaffirmed on December 16, 1975 when that court vacated its June 18, 1974 order annulling the Police Commissioner's determination to dismiss respondents from the Police Department and reinstated its September 30, 1971 order confirming their dismissals. Respondents' appeal as of right from this order was dismissed on May 3, 1977 for lack of a substantial constitutional question having been directly presented. Compare Bray v. Cox, 38 NY 2d 350 (1976).

As a result of the above sequence of events, when respondents filed their present §1983 action in the District Court in May 1978, raising the identical constitutional issues as had been decided against them in their state action, against the same parties, and on the same facts, it should have been barred by New York's law of res judicata as applied through the full faith and credit provision of §1738. The failure of the District Court to dismiss the suit on that

basis was upheld by the court below without reference to §1738.

In so doing, the court below permitted the District Court to do indirectly what this Court has said it did not have jurisdiction to do directly, that is, sit as an appellate tribunal reviewing the judgments of the highest court of a state. See, Rooker v. Fidelity Trust Co., 263 U.S. 413, 415, 416 (1923); see also, Paul v. Dade County, 419 F. 2d 10, 13 (5th Cir., 1969), cert. den., 397 U.S. 1065 (1970); Brown v. Chastain, 416 F. 2d 1012, 1013 (5th Cir., 1969), cert. den., 397 U.S. 951 (1970); Tang v. Appellate Division, 487 F. 2d 138, 141 (2d Cir., 1973), cert. den., 416 U.S. 906 (1973); Anderson v. Lecon, 457 F. 2d 929, 930 (8th Cir., 1972), cert. den., 409 U.S. 879 (1972); Goss v. State of Illinois, 312 F. 2d 257, 259 (7th Cir., 1963). Consistent with this principle, this Court has held that the Full Faith and Credit Clause of the United States Constitution, together with the legis-

lative enactments related thereto, requires that state judgments be given the same res judicata effect in federal court as in state court, even where federal constitutional questions are involved. See, American Surety Co. v. Baldwin, supra, 287 U.S. at 165-166. See also, Gart v. Cole, 263 F. 2d 244, 247-248 (2d Cir., 1958), cert. den., 359 U.S. 978 (1959).

We respectfully submit that the Court of Appeals' rejection here of the defense of res judicata, aside from being a clear violation of a statutory imperative, constitutes a direct affront to the courts of New York, undermines the respect to which final judgments of the courts of the states are justly entitled, threatens the vital interests of federal-state comity sought to be fostered by §1738, which is absolutely necessary to the smooth functioning of a federal judicial system, and, unwarrantedly, and improperly, tends toward the ultimate concentration of

judicial power in the federal courts. See, Stefanelli v. Minard, 342 U.S. 117, 121 (1951).

Recent cases by the Court of Appeals for the Second Circuit demonstrate that court's insistence on exercising jurisdiction in civil rights cases despite the prevailing local law of res judicata and §1738. See, e.g., Tomanio v. Board of Regents, 603 F. 2d 255, 258 (1979), cert. granted, 100 S. Ct. 291 (1979) (decision pending in this Court); Winters v. Lavine, 574 F. 2d 41, 54-55 (1978); Ornstein v. Regan, 574 F. 2d 115, 117 (1978); Mitchell v. National Broadcasting Co., 553 F. 2d 265, 279, n. 6 (1977); McCune v. Frank, 521 F. 2d 1152, 1156, n. 10 (1975); Lombard v. Board of Educ., 502 F. 2d 631 (1974), cert. den., 420 U.S. 976 (1975).

(2)

The decision of the court below is in sharp conflict with the majority of Circuit Courts on the applicability of res judicata to Civil Rights Act cases. See:

First Circuit: PI Enterprises, Inc. v. Cataldo, 457 F. 2d 1012, 1014 (1972); Lovely v. Laliberte, 498 F. 2d 1261, 1263 (1974); Mastraccio v. Ricci, 498 F. 2d 1257, 1258 (1974), cert. den., 420 U.S. 909 (1975) (stating the rule as well established); but cf., Fernandez v. Trias Monge, 586 F. 2d 848 (1978).

Third Circuit: Roy v. Jones, 484 F. 2d 96, 98 (1973); Kauffman v. Moss, 420 F. 2d 1270, 1274 (1970), cert. den., 400 U.S. 846 (1970); but cf., New Jersey Educ. Assn. v. Burke, 579 F. 2d 764, 774 (3d Cir., 1978), cert. den., 439 U.S. 899 (1979).

Fourth Circuit: Wiggins v. Murphy, 576 F. 2d 572, 573 (1978), cert. den., 439 U.S. 1091 (1979); Rimmer v. Fayetteville Police Dept., 567 F. 2d 273, 276 (1978).

Fifth Circuit: Martin v. Delacambre, 578 F. 2d 1164, 1165 (1978); Garner v. Louisiana State Bd. of Educ., 489 F. 2d 91 (1974), cert. den., 419 U.S. 830 (1974); Frazier v. East Baton Rouge Sch. Bd., 363

F. 2d 861, 862 (1966); but cf., American Mannex Corp. v. Rozands, 462 F. 2d 688, 690 (1972), cert. den., 409 U.S. 1040 (1972).

Sixth Circuit: Wilt v. State Bd. of Educ., 608 F. 2d 1126, 1128 (1979); Coogan v. Cincinnati Bar Assn., 431 F. 2d 1209, 1211 (1970).

Seventh Circuit: Blankner v. City of Chicago, 504 F. 2d 1037, 1041 (1974), cert. den., 421 U.S. 948 (1975).

Eighth Circuit: Howe v. Brouse, 432 F. 2d 347, 348 (1970); Jensen v. Olson, 353 F. 2d 825, 827 (1965).

Ninth Circuit: Scoggin v. Schrunk, 522 F. 2d 436, 437 (1975), cert. den., 423 U.S. 1066 (1976); Johnson v. Department of Water and Power, 450 F. 2d 294, 295 (1971), cert. den., 405 U.S. 1072 (1972); Flynn v. State Bd. of Chiropractic Examiners, 418 F. 2d 668 (1969).

Tenth Circuit: Shadid v. Oklahoma City, 494 F. 2d 1267, 1268 (1974).

In addition, the Second Circuit appears to apply its view of res judicata selectively, and in a manner which evidences at least considerable confusion on the part of that court. See, e.g., Sinicropi v. Nassau County, 601 F. 2d 60 (2d Cir., 1979); Winters v. Lavine, supra, 574 F. 2d at 54-60; Ornstein v. Regan, supra, 574 F. 2d at 117; Ellentuck v. Klein, supra, 570 F. 2d at 422; Turco v. Monroe County Bar Assn., 554 F. 2d 515, 520 (2d Cir., 1977), cert. den., 434 U.S. 834 (1977); Thistlethwaite v. City of N.Y., 497 F. 2d 339, 341 (2d Cir., 1974), cert. den., 419 U.S. 1093 (1974); Tang v. Appellate Division, supra, 487 F. 2d 138; Lackawana Police Benevolent Assn. v. Balen, 446 F. 2d 52, 53 (2d Cir., 1971).

The holding below is also inconsistent with this Court's decisions in Preiser v. Rodriguez, 411 U.S. 475, 497 (1973); Angel v. Bullington, 330 U.S. 183, 186 (1946); and Grubb v. Public Utilities Commn., 281

U.S. 470, 476-479 (1930). See also, Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 642 (1977) (plurality opinion per REHNQUIST, J.); Huffman v. Pursue, Ltd., supra, 420 U.S. at 606, n. 18; and Wolff v. McDonnell, 418 U.S. 539, 554, n. 12 (1974).

Petitioner submits that no substantial policy reasons exist for treating §1983 actions as immune from the application of res judicata. The notion that state courts are inadequate to the task of deciding constitutional issues or are generally unsympathetic to civil rights plaintiffs (see Mr. Justice BRENNAN's dissent in Preiser, supra, 411 U.S. at 509, n. 14; cf., Lombard v. Board of Educ., supra, 502 F. 2d at 635) is outdated and contrary to this Court's views of federal-state comity (see Huffman v. Pursue, Ltd., supra, 420 U.S. at 609; Younger v. Harris, 401 U.S. 37 [1971]; Rooker v. Fidelity Trust Co., supra, 263 U.S. at 415; cf., Mitchum v. Foster, 407 U.S. 226, 232-233 [1972]; Stefanelli v. Minard, supra, 342 U.S. at 121) as well

as to §1738. See Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317, 328-332 (1978). Cf., Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

Nor can it be said that in the case at bar respondents were faced with an inadequate state remedy either in law or practice, or that they were denied due process of law as a result of the introduction of the wiretap evidence so as to justify the failure to accord the state court judgments any degree of finality. Indeed, the right alleged to have been infringed is not personal to respondents, and the purported denial of it did not undercut the essential fairness of their trial (see, Stone v. Powell, 428 U.S. 465 [1976]); nor is it claimed that respondents were denied procedural due process.

If the Court of Appeals' decision is allowed to stand on the facts of this case, it will seriously frustrate the salutary purposes of the res judicata doctrine of encouraging, in addition to respect for

the integrity of state court proceedings, an end to litigation and economy of judicial resources. In light of the apparent conflict among the Circuit Courts, this Court should grant certiorari and finally resolve the issues squarely presented for review.

2. THE DECISION OF THE COURT OF APPEALS TO TOLL THE STATUTE OF LIMITATIONS FOR THE PERIOD DURING WHICH RESPONDENTS PURSUED THEIR REMEDY IN STATE COURT IS IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURTS AND IS CONTRARY TO A PROPER RESPECT FOR FEDERAL-STATE COMITY.

The court below erred in tolling the statute of limitations for much the same reasons that it erred in failing to bar the federal action under res judicata. The policies of judicial economy and putting an end to litigation apply equally as well here where the respondents had every opportunity to litigate their state and federal claims to a conclusion in the New York Court of Appeals. Additionally, the same affront to the state courts' integrity is present here as in the res judicata context. That these problems in fact exist is indicated

by this Court's grant of certiorari in Board of Regents v. Tomanio, 100 S. Ct. 291 (1979) (decision pending).

(1)

Under New York Law, a proceeding to review a final determination of an administrative body must be commenced within four months. CPLR 217. The Second Circuit Court of Appeals, however, has applied a three year statute of limitations to §1983 cases borrowed from CPLR 214 (2). See, e.g., Meyer v. Frank, 550 F. 2d 726, 728 (2d Cir., 1977), cert. den., 434 U.S. 830 (1977); Kaiser v. Cahn, 510 F. 2d 282, 284 (2d Cir., 1974); Ortiz v. LeValle, 442 F. 2d 912, 914 (2d Cir., 1971).

The rationale supporting this choice has been substantially impaired by this Court's decision in Chapman v. Houston Welfare Rts. Org., 441 U.S. 600, 618 (1979), in which it was held that §1983 is not a statute which creates substantive rights, but, rather, "only gives a remedy." When CPLR 214(2) refers to

actions "to recover upon a liability... created or imposed by statute", it refers to statutes which create substantive rights. See, State v. Cortelle Corp., 38 NY 2d 83 (1975); Bevelander v. Town of Islip, 10 AD 2d 170 (2d Dept., 1960). Therefore, CPLR 214 (2) is not the most appropriate statute of limitations in a §1983 action in New York.*

(2)

Upon reading the Court of Appeals opinions in Williams v. Walsh, 558 F. 2d 606 (2d Cir., 1977) and Meyer v. Frank, supra, 550 F. 2d 726, (and see Tomanio v. Board of Regents, supra, 603 F. 2d at 258), one would think that the present case would have been decided in conformity therewith. In Williams and Meyer, the Court stressed that the plaintiffs did not raise their constitutional claims in their state court actions and that, therefore, the federal

*We believe the appropriate statute of limitations to be applied in this case is CPLR 217 (four months). However, if that is not applied, the next most appropriate statute of limitations is New York General Municipal Law §50-i (one year and 90 days).

courts would not be precluded by the principles of federalism from entertaining them. Both cases were distinguished by the court below, however, apparently because a criminal prosecution was pending against respondents at the same time that their Article 78 proceeding was being litigated. Whether a criminal prosecution was then in progress, albeit predicated on the same evidence as was used in the civil proceeding, is irrelevant here because the New York Court of Appeals, in dismissing respondents' second appeal, did not consider itself bound by the outcome in the criminal action, which was determined after that court's dismissal of respondents' first appeal for failure to prosecute.

The court below further declared that since respondents did not "choose" the state forum in which to litigate their federal claims they could not have held those claims in reserve and thus could not be precluded from relitigating them in federal court. (But compare Thistle-

thwaite v. City of New York, supra, 497 F. 2d at 341-342; and Billingsley v. Seibels, 556 F. 2d 277 [5th Cir., 1977]). This too, we suggest, is immaterial since respondents' ultimately unsuccessful appeals through two tiers of state appellate courts were concerned solely with their Article 78 proceeding and were at no time dependent, as those courts so found, upon the resolution of the criminal case despite the Appellate Division's desire to treat the cases uniformly.

While respondents may have been involuntary parties to the criminal suit, that was not true with respect to the Article 78 proceeding. The fact that they were defendants in the criminal action should have no bearing on the decision to invoke res judicata or toll the statute of limitations inasmuch as it assumes sub silentio what we have earlier argued is the obsolete notion that state courts are not fully capable of resolving constitutional issues and are unsympathetic to

§1983 plaintiffs. In this context, we would note that although the court below made several references to Younger v. Harris and its progeny, it nowhere stated that respondents would have been met with an abstention-based dismissal of their complaint had they attempted to enter federal court immediately after their cause of action accrued in October 1970. Indeed, it is far from certain that respondents would have been denied a federal forum at that time or that they could not have persuaded the court to retain jurisdiction pending the outcome of the state proceedings.

We are at a loss to understand how the court below, in the interest of federalism, can speak of deferring the federal action until all the state-created issues are decided in state court when to have done so here, where respondents exhaustively litigated their state and federal questions in state court, was effectively to nullify all that had gone before in the state courts.

This is particularly perplexing inasmuch as respondents have urged no overriding federal policy concerns, least of which any personal to themselves, so as to warrant tolling in the interests of justice. Cf., Burnett v. New York Cent. R. Co., 380 U.S. 424, 428 (1965). See United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, supra, 428 U.S. 465. Under the circumstances at bar, we greatly doubt that the balancing of substantive federal policies against those behind statutes of limitations, discussed in Williams v. Walsh, supra, 558 F. 2d at 674, and Meyer v. Frank, supra, 550 F. 2d at 729, tilts in respondents' favor.

(3)

The decision to toll the borrowed state statute of limitations is in conflict with the decisions of other circuit courts, because while the court expressed "no doubt that a federal court has the power to toll borrowed statutes of limitations in §1983 actions" (6a) (but cf.,

Ramirez de Arellano v. Alvarez de Choudens, 575 F. 2d 315, 319 [1st Cir., 1978]), it omitted the corollary to that purported rule that federal courts should apply the state's laws on tolling in addition to the limitations period itself. See, Ammlung v. City of Chester, 494 F. 2d 811, 815 (3d Cir., 1974), citing Duncan v. Nelson, 466 F. 2d 939, 941 (7th Cir., 1972), cert. den., 409 U.S. 894 (1972), and Jones v. Bombeck, 375 F. 2d 737, 738-739 (3d Cir., 1962). Cf., Blair v. Page Aircraft Maintenance, Inc., 467 F. 2d 815, 821 (Tuttle, C.J., concurring and dissenting.

The Ammlung court declared that "due regard for our system of federalism requires that state concepts of tolling be applied to state statutes of limitations" (494 F. 2d at 816). As New York has no tolling statute pertinent to the instant matter, we submit the court below was incorrect in borrowing its statute of limitations while eschewing those laws and policies which are part and parcel thereto.

See, Johnson v. Railway Express Agency, 421 U.S. 454, 464 (1975):

> In virtually all statutes of limitations the chronological length of the limitation period is interrelated with the provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exemptions thereto, on the prosecution of a closely analogous claim.

(4)

A further rationale for the court's decision was that the policies behind the strict enforcement of statutes of limitations would not be frustrated by tolling. While the court below pointed to the alleged diligence with which the respondents pursued their claims it neglected to mention that almost two and a half years passed between the filing of their first appeal to the New York Court of Appeals in September 1971 and its dismissal by that court in February 1974 for failure to prosecute. Nor did the Court of Appeals refer to the year long

interim between the second dismissal of respondents' appeal in May 1977 and the filing of their §1983 complaint in May 1978. Also unnoted is the seven month delay from the denial of respondents' motion for leave to appeal in October 1977 to the filing of the federal complaint. This is hardly the diligence one would expect from litigants eager to press their claims in federal court. Cf., United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 708 (1966); Meyer v. Frank, supra, 550 F. 2d at 730.

Furthermore, the conclusion that petitioner was not "lulled" into believing respondents' §1983 claims would never be raised is not compelling since petitioner could well have expected that, given the above delays, respondents would not have sought to raise the identical federal issues in federal court, particularly since those issues were "hotly contested throughout the state proceedings." (9a).

Having made no effort whatsoever to enter federal court when their claim accrued in October 1970, or at least to have requested the court to retain jurisdiction were they to have been faced with abstention (see, e.g., Harris County Commn'rs Court v. Moore, 420 U.S. 77, 88, n. 14 [1975]; American Trial Lawyers' Assn., v. New Jersey Sup. Ct., 409 U.S. 467, 469 [1973]; Railroad Commn. of Texas v. Pullman Co., 312 U.S. 496, 501-502 [1941]; Fulford v. Klein, 529 F. 2d 377, 378 [5th Cir., 1977]), respondents should not now be permitted to take advantage of the second bite at the cherry afforded them by the Court of Appeals.*

3. SECTION 1983 SHOULD NOT BE CONSTRUED AS AUTHORIZING A SUIT OF THE INSTANT SORT.

Although respondents premise their claim of District Court jurisdiction on 28 U.S.C. §§1331 and 1343, we submit, neverthe-

*As this Court well knows, state court remedies need not be first exhausted before recourse may be had to federal court under §1983. See, Monroe v. Pape, 365 U.S. 167, 183 (1961).

less, that they have not alleged a deprivation of rights secured by the Constitution or by act of Congress providing for equal rights or for the protection of civil rights, including the right to vote. Chapman v. Houston Welfare Rts. Org., supra, 441 U.S. at 615-620. Consequently, their action is not authorized by 42 U.S.C. §1983 as being based on a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws..." 42 U.S.C. § 1983.

Neither the Constitution, nor §605 of the Federal Communications Act (47 U.S.C. §605), nor the Omnibus Crime Control and Safe Streets Act of 1968 "secured" to the respondents any "rights, privileges or immunities"; rather, respondents were at most incidental beneficiaries of exclusionary rules which were adopted by the courts, and later by Congress in the Omnibus Crime Control Act, to serve ends other than protecting wrongdoers. As United States v. Janis, supra, 428 U.S.

433, and Stone v. Powell, supra, 428 U.S. 465, seem clearly to indicate, whatever rights respondents may have to object to the admission of the wiretap evidence are not secured to them by the Constitution or Section 605 of the Federal Communications Act. The judge-made rule of exclusion was not designed for respondents' benefit. Its "primary justification... is the deterrence of police conduct that violates Fourth Amendment rights." Stone v. Powell, supra, 428 U.S. at 486. See also, Rosenberg v. Martin, 478 F. 2d 520, 524 (2d Cir., 1973), cert. den., 414 U.S. 872 (1973).

In support of our argument that such "rights", even assuming, arguendo, the applicability here of the Omnibus Crime Control Act, are not among the statutory "secured rights, privileges, and immunities" referred to in §1983, we respectfully refer the Court to Mr. Justice POWELL's concurring opinion in Chapman, supra, at 623-646, joined in by the CHIEF JUSTICE and Mr.

Justice REHNQUIST, where we believe the point is convincingly demonstrated that this language in §1983 has reference only to the Constitution and "federal legislation providing specifically for equality of rights" (441 U.S. at 637). Since the rights asserted here are not of that character, if Mr. Justice POWELL's exhuastively documented thesis as to the scope of §1983 is accepted, then it follows that this is not a proper §1983 action.

Conclusion

The short of the matter here is that by a combination of strained approaches, the Court of Appeals for the Second Circuit has negated the policies behind the doctrine of res judicata and §1738 and behind recognition of statutes of limitations, and thus allowed respondents to enter federal court and be heard on claims which accrued eight years earlier and which could have been litigated in the state proceeding and, indeed, were litigated

in that proceeding. To the extent this result is not simply absurd, it is at least an affront both to Congress, which enacted §1738, and to the courts of the State of New York.

A writ of certiorari should issue to review the judgment and order of the Second Circuit Court of Appeals.

March 14, 1980

Respectfully submitted,

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APPENDIX A
OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 290—September Term, 1979.

(Argued November 1, 1979
Decided December 19, 1979.)

Docket No. 79-7479

CHARLES W. LEIGH and LEONARD ALLEN,

Appellants,

—v.—

ROBERT MCGUIRE, individually and as Police Commissioner of the City of New York and Chairman of the Board of Trustees of the Police Pension Fund, Article II,

Appellee.

Before:

MOORE, TIMBERS and VAN GRAAFEILAND,
Circuit Judges.

Appeal from a judgment entered in the Southern District of New York, Robert W. Sweet, *District Judge*, granting defendant Police Commissioner's motion for summary judgment and dismissing the civil rights

complaint of former New York City police officers on the ground the action was barred by the New York three-year statute of limitations.

Reversed and remanded.

VICTOR J. HERWITZ, New York, N.Y. (Donald E. Nawi, New York, N.Y., on the brief), *for appellants.*

L. KEVIN SHERIDAN, New York, N.Y. (Alexander G. Schwartz, Corporation Counsel, City of New York, and Alexander J. Wulwick, New York, N.Y., on the brief), *for appellee.*

TIMBERS, *Circuit Judge:*

Appellants, two former police officers who were discharged from the New York City Police Department in 1970, commenced the instant action in the Southern District of New York on May 12, 1978 pursuant to 42 U.S.C. §1983 (1976), seeking to vacate and annul their dismissal from the force. The basis of their action was that the use of illegally obtained wiretap evidence against them in Police Department proceedings violated their rights under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2511 *et seq.* (1976), and under the Fourth and Fourteenth Amendments. The district court in an opinion filed April 6, 1979 granted summary judgment for appellee Police Commissioner, ruling that the action was barred by the applicable New York three-year statute of limitations.

From the judgment entered on Judge Sweet's opinion, this appeal has been taken.

The issue on appeal is whether the statute of limitations should be tolled during the period in which appellants litigated the same substantive claim in the New York state courts. Under the circumstances of this case, we hold that the statute should be tolled. We therefore reverse and remand.[1]

I.

In view of the narrow legal issue on which this appeal turns, we cut through the procedural morass of state court proceedings during the past decade and briefly summarize here only those facts and prior proceedings believed necessary to an understanding of our ruling on the legal issue presented.[2]

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1 Although the district court dismissed the complaint as time-barred, it also held that the action would not have been barred by res judicata. We agree with the district court's conclusion in that respect, and therefore affirm on that issue.

Although appellants' discharges ultimately were upheld by the New York courts in an Article 78 proceeding, that decision was the result of an apparent procedural ruling. In no sense could appellees be regarded as having lost on the merits of the issues which formed the basis of their instant §1983 action. On the contrary, the state court decision in *People v. Koutnik*, 44 A.D.2d 48, 353 N.Y.S.2d 197 (1st Dept. 1974), *aff'd*, 37 N.Y.2d 873, 340 N.E.2d 727, 378 N.Y.S.2d 360 (1975), vindicated appellants' claims of wiretap illegality.

Therefore, in view of the fact that appellants presented their federal claims successfully to the New York courts, and were not denied relief because they lost on the merits of those issues, we believe that the district court was correct in ruling that res judicata would not bar the §1983 action. *See Winters v. Lavine*, 574 F.2d 46 (2 Cir. 1978); *Lombard v. Board of Education*, 502 F.2d 631 (2 Cir. 1974), *cert. denied*, 420 U.S. 976 (1975).

2 We assume familiarity with Judge Sweet's succinct, well reasoned opinion of April 6, 1979.

Appellants Charles Leigh and Leonard Allen joined the New York City Police Department in 1951. In 1968 they were indicted for an alleged conspiracy to accept bribes from gamblers. They were suspended from the force without pay. In October 1970 the Acting Police Commissioner made a final determination dismissing appellants from the force. Appellants then commenced an Article 78 proceeding, N.Y. Civ. Prac. Law §7801 (McKinney 1963), alleging, inter alia, that their dismissals were based on evidence obtained by means of illegal wiretaps. From this point on, appellants' Article 78 and criminal proceedings progressed "in tandem" through the New York courts. Although technically separate, the issues presented in each were substantially the same. The New York courts recognized that the criminal and Article 78 proceedings were closely tied.[3]

Appellants' dismissal from the force was upheld by the Appellate Division, First Department, in 1971. The following year they were convicted on the criminal charges. In February 1974, however, the Appellate Division ruled that certain wiretap evidence which had been used in appellants' criminal trial had been obtained illegally. Their convictions, therefore (along with the convictions of several other defendants), were vacated. *People v. Koutnik, supra* note 1. Because of the wiretap ruling in *Koutnik*, the Appellate Division entered an order on June 18, 1974 which annulled appellants' dismissal from the police force. This order of

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3 In its Memorandum Opinion of June 18, 1974, the Appellate Division stated that "[t]hroughout these entire proceedings this Court has considered the criminal and Article 78 proceedings together in an attempt to achieve a uniform and just result." *Allen v. Murphy*, 45 A.D.2d 693, 356 N.Y.S.2d 865, 867 (1st Dept. 1974).

annulment was stayed, however, pending the state's appeal from the Appellate Division's ruling in *Koutnik*.

In October 1975 the New York Court of Appeals affirmed the Appellate Division's ruling in *Koutnik* that the wiretap evidence had been illegally obtained. Since the Court of Appeals decision ostensibly settled once and for all that the wiretap evidence against appellants—the basis for the bribery charges in both the departmental and the criminal proceedings—had been obtained illegally and hence was inadmissible, appellants sought appropriate final relief in their Article 78 proceeding. They therefore moved in the Appellate Division to vacate the stay of the June 18, 1974 order which had annulled their dismissals from the police force. In December 1975, however, the Appellate Division, without opinion, denied appellants' motion and instead granted the motion of the Police Commissioner to vacate the June 18, 1974 order of annulment.[4]

The final result of the extensive proceedings in the state courts was that appellants succeeded in establishing their claims of constitutional violations, and yet were denied relief. In an effort to correct this incongruous result, appellants commenced the instant §1983 action to obtain the relief which had been denied them at the state level.

II.

It is well established that in an action brought under §1983 federal courts should apply the statute of limitations applicable to the most similar state cause of action. *Williams v. Walsh*, 558 F.2d 667, 670 (2 Cir. 1977); *Kaiser v. Cahn*, 510 F.2d 282, 284 (2 Cir. 1974). In this case, the New York three-year statute of limitations must govern the claim.[5] Appellants' cause of action first accrued when they were dismissed from the force in 1970. Their §1983 action was not commenced until May 1978. Appellants argue, however, that the §1983 complaint was timely filed because the statute of limitations was tolled until at least December 1975, while they litigated their claims in the state courts.

There is no doubt that a federal court has the power to toll borrowed statutes of limitations in §1983 actions. *Meyer v. Frank*, 550 F.2d 726, 729 (2 Cir.), *cert. denied*, 434 U.S. 830 (1977); *Kaiser v. Cahn, supra*, 510 F.2d at 286-87. The question before us today is whether the circumstances of this case warrant such tolling. In answering this question, we must attempt to balance policies of federalism which are served by tolling the statute of limitations against policies of repose served by strict application of the statute of limitations.

Ordinarily, the remedial policy underlying §1983 would not be impinged by strict application of the three-year state limitations period, since §1983 plaintiffs are not required to exhaust state remedies before seeking federal relief. Nevertheless, considerations of comity and federalism under some circumstances do require that the statute of limitations be tolled during the pendency of state court or agency proceedings. Federal courts should avoid as much as possible "in-

4 The reasoning behind the Appellate Division's refusal to grant appellants' request for ultimate relief is unclear. Presumably it reflected the court's view that, for procedural reasons, the Appellate Division should not upset its original ruling in the case.

5 N.Y. Civ. Prac. Law §214(2) (McKinney Supp. 1975). This section includes actions "to recover upon a liability, penalty or forfeiture created or imposed by statute. . . ."

truding upon the domain which is particularly the responsibility of the state courts". *Williams v. Walsh, supra*, 558 F.2d at 674. Thus, where a potential §1983 plaintiff initially enters the state courts or administrative agencies to prosecute *state-created* claims, federal courts have tolled the §1983 statute of limitations during the pendency of the state or administrative proceedings. In this way, federal courts have protected the plaintiff's right to seek his federal remedies under §1983 without interfering with the state's resolution of its own causes of action. *Tomanio v. Board of Regents*, 603 F.2d 255 (2 Cir. 1979); *Mizell v. North Broward Hospital District*, 427 F.2d 468 (5 Cir. 1970); *see Williams v. Walsh, supra*, 558 F.2d at 674.

In the instant case, the district court, relying upon *Meyer v. Frank, supra*, and *Williams v. Walsh, supra*, held that tolling would not further the interests of federalism because appellants raised both state and federal issues in the state courts. Thus, concluded the court, "the policy of avoiding federal interference with state affairs survives here in a diluted posture." (quoting *Meyer v. Frank, supra*, 550 F.2d at 729).

The mere fact that federal claims were raised in the state proceedings, however, does not necessitate the conclusion that policies of federalism do not support tolling. Here, appellants were being *criminally* prosecuted, and as stated above, the Article 78 proceeding was very much intertwined with the criminal proceedings. When the Appellate Division found the wiretaps illegal in the criminal case of *People v. Koutnik, supra*, for example, it also vacated the dismissal orders in the Article 78 proceeding, noting that the civil and criminal actions required a "uniform result." *See* note 3, *supra*.

The fact that appellants' federal claims were raised in criminal proceedings and in the Article 78 proceeding closely tied to the criminal proceedings distinguishes this case from *Meyer* and *Williams*. Unlike in *Meyer* and *Williams*, appellants here did not "choose" the state forum to litigate their federal claims while holding the federal forum "in reserve." *Meyer v. Frank, supra*, 550 F.2d at 729. Appellants were forced to raise their constitutional claims as a defense in their state trial. Moreover, the interrelationship of the criminal and civil actions at the state level provides strong support for the conclusion that the statute of limitations should be tolled here. Federal courts must be particularly wary of interfering with the functions of state courts when state criminal proceedings are involved. *See generally Younger v. Harris*, 401 U.S. 37 (1971); *Steffel v. Thompson*, 415 U.S. 452 (1974); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Interests of federalism, therefore, favored the deferral of the federal action here until the issues all were finally resolved in the state criminal proceedings, including two levels of appeals.

By tolling the statute of limitations during the pendency of appellants' Article 78 proceeding and the criminal appeals involving the issue of wiretap illegality, we are able to comply with the *Younger* rule that federal courts should "vindicate and protect federal rights and federal interests . . . in ways that will not unduly interfere with the legitimate activities of the States." *Huffman v. Pursue, Ltd., supra*, 420 U.S. at 601 (quoting *Younger v. Harris, supra*, 401 U.S. at 44). Tolling here permits the federal courts to show the "proper respect for state functions", *Younger v. Harris, supra*, 401 U.S. at 44, by permitting final resolution of

issues in state criminal appeals, while at the same time enabling us to preserve the right of appellants to vindicate their federal claims under §1983.

We therefore hold that the district court erred in its belief that concepts of federalism do not support tolling under the circumstances of this case.

III.

Having concluded that the remedial policy of §1983 and considerations of federalism support tolling in this case, we turn now to a consideration of the policies served by strict application of the three-year statute of limitations.

Strict enforcement of statutes of limitations protects defendants who have been "lulled" into a state of repose by plaintiffs who have "slept on their rights". *See Meyer v. Frank, supra,* 550 F.2d at 730. In the instant case, however, appellants were diligent in the pursuit of their claims, having raised the federal issues in the state courts almost immediately after their discharge from the police force. By no means can they be regarded as having "slept" on their rights. Likewise, appellants did not "lull" appellee into believing that the federal issues underlying the §1983 claims would never be raised. The precise issues involving wiretap illegality that form the basis of the §1983 action were hotly contested throughout the state proceedings.[6] Thus, the policies traditionally served by strict enforcement of the statute of limitations will not be frustrated by tolling in this case.

6 It may be noted further that the state court records have preserved most of the relevant evidence in this case. The federal court therefore is not faced with the prospect of adjudicating "stale" claims.

To summarize: we hold, under the special circumstances of this case, that federalism considerations support the tolling of the statute of limitations governing the §1983 action during the pendency of the interrelated state criminal and Article 78 proceedings; and that the policies of repose underlying the statute of limitations will not be adversely affected by such tolling. We therefore reverse the holding of the district court that appellants' §1983 action is time-barred.

Reversed and remanded.

APPENDIX B

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CHARLES W. LEIGH and LEONARD ALLEN,

Plaintiffs,

-against-

ROBERT McGUIRE, individually and as Police Commissioner of the City of New York and Chairman of the Board of Trustees of the Police Pension Fund, Article II.,

Defendants.

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78 Civ. 2210 (RWS)

OPINION

SWEET, D. J.

After nine years of litigation in the New York State courts, plaintiffs Charles W. Leigh and Leonard Allen ("the officers") commenced an action in this court, pursuant to 42 U.S.C. § 1983, seeking to vacate and annul their dismissal from the New York City Police Department in 1968. The officers assert that the use of illegally obtained wiretap evidence in their Police Department trial deprived them of rights

secured by the United States Constitution and the Omnibus Crime Control Act. Defendant Robert B. Maguire, the Police Commissioner of New York City ("the Commissioner") now moves, and plaintiffs cross-move, for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons discussed below, the Commissioner's motion is granted, and the officers' cross motion denied.

The resolution of the pending motion has required a review of the complicated litigation involving the officers in the state courts. The officers were employed by the New York City Police Department from July 16, 1951 until July 2, 1968 when they were suspended without pay, pending trial of charges pursuant to the Administrative Code of the City of New York, § 434a-20.0. On July 2, 1968, in addition to being suspended from the Police Department, the officers were indicted by a grand jury in New York County, and charged, inter alia, with having con-

spired with other members and ex-members of the New York City Police Department to take unlawful fees in violation of former New York Penal Law §§ 580, 1826. On October 7, 1970, the Acting Police Commissioner concurred in the departmental findings of guilt and dismissed the officers. The officers then instituted a proceeding under Article 78 of the New York C.P.L.R. challenging the Police Commissioner's determination as being, inter alia, arbitrary, and based on evidence obtained in violation of state and federal constitutional and statutory law.

From that point on, the civil and criminal proceedings continued in tandem through the New York courts. On October 19, 1971 one of the officers (Allen) filed in the New York Court of Appeals a notice of appeal from a September 30, 1971 order of the New York Supreme Court, Appellate Division which, inter alia, confirmed the Police Commissioner's determination of October 7, 1970. On February 15, 1974

this appeal was dismissed by the Court of Appeals on the ground that it had not been timely argued or submitted to that court.

In the meantime, the officers had been convicted by the Honorable Harold Birns, after a non-jury trial for conspiracy to take unlawful fees, on November 29, 1972. They received suspended six month prison terms and fines of $250, which were paid.

On February 25, 1974 the Appellate Division in People v. Koutnik, 44 A.D. 2d 48 (1974) held that certain wiretap evidence which had been used in the officers' criminal trial had been illegally obtained and that their convictions, and the convictions of certain other defendants on related charges, had to be vacated and remanded to the New York Supreme Court. In light of its decision in Koutnik, the Appellate Division on June 18, 1974 issued an order which, inter alia, annulled the Police Commissioner's October 7, 1970 determination. On December 5, 1974, however, upon motion by the Commissioner's prede-

cessor, the Appellate Division granted a stay of its June 18, 1974 order pending determination of an appeal by the state regarding defendants other than the officers to the Court of Appeals in People v. Koutnik. On October 23, 1975 the Court of Apeals affirmed the Appellate Division's holding in Koutnik that the use of the wiretap evidence was unlawful. The officers then moved in the Appellate Division to vacate that court's December 5, 1974 stay, and the Police Commissioner moved to vacate that court's June 18, 1974 order. On December 16, 1975 the Appellate Division, without opinion, granted the Police Commissioner's motion and denied the officers' motion. That decision was presumably based upon New York C.P.L.R. 5015(a) which states: "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just on motion of any interested person with such notice as the court may direct upon the ground of: (5) reversal,

modification or vacatur of a prior judgment or order upon which it is based."

The officers then filed in the New York Court of Appeals an appeal as of right from the Appellate Division's December 16, 1975 orders, and raised questions of state and federal constitutional law. On May 3, 1977 the New York Court of Appeals denied plaintiffs' appeal, without opinion. That court's disposition was listed in the New York Reporter under a heading entitled "Appeals on Constitutional Grounds." See 42 N.Y. 2d 823. Following dismissal of their appeal as of right, plaintiffs filed an application for leave to appeal, which was denied on October 6, 1977. See 42 N.Y. 2d 809 (1977).

Here then is a litigation history which established the fundamental merit of the officers' claim, that is, the New York Courts ultimately determined that the use of wiretaps was improper. Notwithstanding that determination, the end result with respect to the officers was to deny them

the relief sought (their reinstatement as police officers). The court has determined, however, that the Commissioner's motion for summary judgment must be granted because plaintiffs' 42 U.S.C. § 1983 action is barred by the statute of limitations. However, the Commissioner's motion for summary judgment on the ground of res judicata is denied for the reasons set forth below.

Statute of Limitations

This action, brought under the federal Civil Rights Act, "is subject to the statute of limitations the state courts would apply in an analogous state action." Meyer v. Frank, 550 F. 2d 726, 728 (2d Cir. 1977), cert. denied, 434 U.S. 830 (1977). Accordingly, the three year New York statute of limitations governs this Section 1983 claim. Id. The only open questions with respect to this issue are, when does the limitations period begin, and is the statute tolled.

The statutory clock began to run on the date of the officer's termination from

the Police Department (October 7, 1970) because that is when the federal causes of action accrued. See Meyer at 728. The officers' assertion that the statute did not begin to run until December, 1975 or until October, 1977[2] is without merit because: "The federal [Section 1983] remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1961).

The officers urge that the court adopt Mizell v. North Broward Hospital District, 427 F. 2d 468 (5th Cir. 1970). Under Mizell, a state statute of limitations applicable to a Section 1983 civil rights action is tolled while a potential federal civil rights plaintiff is pursuing state law causes of action in the state courts and state administrative agencies. Under Mizell, such tolling occurs as a matter of federal law, without reliance on a specific tolling statute. See

Williams v. Walsh, 558 F. 2d 667, 673 (2d Cir. 1977). The Second Circuit has in at least two recent cases considered, and failed to adopt the Mizell approach. See Meyer; Williams, supra. As in Meyer, the officers here did not restrict their Article 78 petition to claims grounded in state law. As was the case in Meyer, "[t]his is not a case like Mizell where the prior state court proceeding was directed at obtaining relief through an action grounded solely in state law." 550 F. 2d at 729 (footnote omitted). As the Meyer court stated, "The only thing [plaintiff] has held in reserve has been the federal court itself; federal law has played a principal role all along. The result is that the policy of avoiding federal interference with state affairs survives here in a diluted posture." Id.

Res Judicata

Title 28 of the United States Code, Section 1738, mandates that federal courts

give full faith and credit to judgments entered by state courts of competent jurisdiction. See Mitchell v. National Broadcasting Co., 553 F. 2d 265, 274 (2d Cir. 1977), and cases cited therein.

In spite of the "seeming clarity" of Section 1738, however, a number of Second Circuit cases "have analyzed the issue of the extent to which the prior state court judgment precludes the subsequent Civil Rights Act lawsuit and make no reference whatever to § 1738 or to the concepts of res judicata and collateral estoppel which would be employed by the courts of the state in which the prior judgment was rendered." Winters v. Lavine, 574 F. 2d 46 (2d Cir. 1978), citing, inter alia, Lombard v. Board of Education, 502 F. 2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975). The Winters court noted that cases like Lombard appear to be applying a general federal law of res judicata which is explained by the existence of "'special rules whereby in certain circumstances

state court judgments are accorded perhaps ...a lesser effect by a federal court in a Civil Rights Act case than they would be given by the state courts." 574 F. 2d at 55, quoting McCune v. Frank, 521 F. 2d 1152, 1156 n. 10 (2d Cir. 1975) (emphasis in Winters). The flexibility in this area is reflected in a recent law review article cited in Winters for the proposition that "the decisions of the lower courts teem with inconsistencies." 574 F. 2d at 551, quoting Theis, Res Judicata in Civil Rights Act cases: An Introduction to the Problem, 70 N.W. U. L. Rev. 859, 865 & n. 35 (1976). As noted by the Second Circuit, the problems in this area "apparently exist when "well-defined federal policies, statutory or constitutional,...compete with those policies underlying Section 1738." 574 F. 2d at 55, quoting Mitchell v. National Broadcasting Co., supra, 553 F. 2d 265, 274 (2d Cir. 1977), quoting American Mannex Corp. v. Rozands, 462 F. 2d 688, 690 (5th Cir.), cert. denied,

409 U.S. 1040 (1972). This, indeed, is such a case.

Here the officers did present successfully to the New York courts the constitutional arguments they now assert. There was, however, no final determination on the merits by a New York civil court subsequent to the holding of the Court of Appeals in Koutnik that use of the wiretap evidence was unlawful in the criminal proceeding. See 37 N.Y. 2d at 873. In these circumstances, where the constitutional issue was raised in the state criminal proceeding but not finally litigated (because the Court of Appeals holding that the wiretap evidence was tainted was never considered with respect to the officers' prior convictions), res judicata does not bar their Section 1983 claim. Because of the court's determination concerning the statute of limitations, however, the court may not entertain the action.

Settle judgment on notice within ten days hereof.

IT IS SO ORDERED:

Robert W. Sweet
U.S.D.J.

Dated: New York, New York
April 6, 1979

FOOTNOTES

1/ N.Y. Civ. Prac. Law §214(2) (McKinney's Supp. 1975) includes actions "to recover upon a liability, penalty or forfeiture created or imposed by statute...".

2/ At the very latest, plaintiffs' Section 1983 claims may be said to have accrued in 1974, when the Appellate Division stayed its reinforcement order.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the TWENTY-NINTH day of January, one thousand nine hundred and eighty.

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CHARLES W. LEIGH and LEONARD ALLEN
Plaintiffs-Appellants

v.

ROBERT MCGUIRE, individually and as Police Commissioner of the City of New York and Chairman of the Board of Trustees of the Police Pension Fund, Article II
Defendant-Appellee

79-7479

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge
IRVING R. KAUFMAN